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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1276

ELIZAVETA DANILA, NICOLAE DANILA, ELEANORA CATUT, ILENA POPESCU, GHEORGHE POPESCU, BUNEA POPESCU and IOAN POPESCU,

Petitioners,

vs.

GEORGE DOBREA,
Executor of the Estate of
John Danila, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To Supreme Court of Ohio.

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PETITION FOR A WRIT OF CERTIORARI To Supreme Court of Ohio.

The Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on January 24, 1968.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion and judgment of the Probate Court is unreported and is printed in Appendix A hereto. The decision of the Court of Appeals for the Ninth District of Ohio is unreported and is printed in Appendix B hereto. The judgment of the Supreme Court of Ohio is unreported and is printed in Appendix C hereto.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on January 24, 1968. Rehearing was denied on February 14, 1968, Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

THE MANNER IN WHICH THE FEDERAL QUESTIONS ARE RAISED.

The petitioners sought review in the Supreme Court of Ohio of the decision of the Court of Appeals of Ohio affirming, per curiam, the judgment of the Probate Court, whereby the statutory rights of these petitioners were extinguished in violation of due process of law.

The right to a review by the Supreme Court of Ohio is dependent upon the discretion of the court in determining that the case is one of public or great general interest, or that a substantial constitutional question is involved, Rules of Practice of the Ohio Supreme Court, Rule I, Sec. 1A (a) (b) (c), Rule II, Sec. 3, printed in Appendix D hereto.

The petitioners sought review of the decision of the Court of Appeals by means of a motion in the Supreme Court of Ohio requesting it to direct the lower appellate court to certify its record to the Supreme Court for review, and as an appeal of right on the ground that the decision of the Court of Appeals of Ohio violated their constitutional rights as guaranteed to them by Article I, Section 16, of the Ohio Constitution, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Ohio denied the motion to certify and rejected the appeal as of right on the basis that no substantial constitutional question is involved.

The petitioners applied to the Supreme Court of Ohio for a rehearing, urging that the judgment below is so offensive to the common and fundamental ideas of fairness, as to amount to a denial of due process of law. The application was denied on February 14, 1968.

QUESTIONS PRESENTED.

1. Are the orders of a Probate Court approving the final account of the executor (the respondent), and withholding payment of the distributive shares of the specific legatees (the petitioners), through the appointment of the respondent as trustee of such shares, with no notice to the legatees whose addresses were known and/or to their legal counsel of record, except by publication, in accordance with due process of law?

2. Have the petitioners been denied due process and the equal protection of the laws as secured to them by the Fourteenth Amendment to the Constitution of the United States as a result of the Probate Court's refusal to recognize and respect the function and the authority of their legal counsel of record?

STATUTE INVOLVED.

Section 2109.35(A)(C) of the Revised Code of Ohio involved herein is set out in Appendix E, *infra*, pp. 21-22.

STATEMENT.

John Danila died testate on June 27, 1964. His will was prepared by counsel for the executor, respondent herein, and also counsel for one of the churches which was named a residuary legatee. The priest of said church-legatee was a witness to the will.

The respondent was designated as the executor in the will, and thereupon, was appointed as such by the court.

The decedent, John Danila, had no relatives in the United States. All the natural objects of his bounty, these petitioners—his blood relatives—are in Romania. With regard to them, his will provided as follows:

> "Item III. I direct my executor to distribute equally all the monies remaining under my name on deposit at City Bank Co. of Lorain, Ohio, National Tube Company Credit Union and The Pioneer Savings and Loan Company of Cleveland, Ohio, to the following persons: Elizaveta Danila, my sister-in-law, now a resident of the village of Solojeni, Region of Oltenia, Romania; Nicolae Danila, nephew, now a resident of the village of Solojeni, region of Oltenia, Romania; Eleanora Catut, niece, last known address, Targu Tiu, Region of Oltenia, Romania; Ileana Popescu, niece, a resident of the village of Bradiceni, region of Oltenia, Romania; Gheorghe Popescu, son of my niece, Ileana Popescu, a resident of the Village of Bradiceni, region of Oltenia, Romania; Bunea Popescu, son of my niece, Ileana Popescu, now a resident of the Village of Bradiceni, region of Oltenia, Romania; Ioan Popescu, son of my niece, Ileana Popescu, a resident in the village of Bradiceni, region of Oltenia, Romania."

The total of the specific legacies, hereinabove provided, was $40,544.33

The will provided further that the rest and residue, consisting of stocks and bonds, which was the substantial part of the estate, was to be divided equally among three strangers to the testator—Elizabeth Gall, The St. Mary's Romanian Orthodox Church of Cleveland, Ohio, and St. Basil's Romanian Greek Catholic Church of Lorain, Ohio. The decedent was not a member of the beneficiary churches, and, in fact, never knew of or attended St.

Mary's Church in Cleveland. Elisabeth Gall was a mere acquaintance of the decedent.

The first notification which the petitioners, who are all residents of Romania, received about the death of John Danila, was about four months after his death by means of a letter addressed to them by the attorney for the respondent (Exhibit 4e). In this letter, the attorney for the respondent wrote, among other things, as follows:

> "As soon as the administration of the estate is completed, the administrator at the direction of the Probate Court, shall send you the money just as your uncle wished. We shall notify you at the appropriate time. * * * *It will not be necessary that any of you seek legal intervention in order to receive the money inasmuch as the Court here shall direct when and how it shall be sent."* (Italics ours.)

The respondent never sent the petitioners a copy of the will and never informed them about the nature and the amount of the estate, although repeatedly requested to do so. One of the petitioners declared, relevant hereto (Exhibit 4), as follows:

> "I am not informed about the nature of or about the proceedings connected with the administration of my aforesaid uncle's estate, and neither do I know about the entire testamentary disposition of his estate. * * * I have written three letters to attorney John Sibisan of Cleveland, Ohio, U. S. A., requesting that he send me a copy of the will and that he give me an accounting of the exact nature and status of the estate left by my uncle, but to date (October 27, 1965) he has not answered my letters."

Another legatee (one of petitioners), Ileana Popescu (Exhibit 5a), stated:

> "I read the letter which was addressed on October 7, 1964, by attorney John Sibisan from Cleveland, Ohio

to my brother Nicolae Gh. Danila. As a result of said letter, I wrote two letters to attorney John Sibisan, giving him the addresses which he requested, requesting him to send us copies of the last will and testament of the decedent, John Danila, and that he inform us about the exact amount of the estate as well as its status of administration. Until the present time (January 6, 1966), I have not received any answer to the above mentioned letters from attorney John Sibisan or from the executor of the estate or from any other person."

On or about January 26, 1965, undersigned counsel for the petitioners telephoned the attorney for the executor, and informed him that he was legal counsel for the specific legatees in Romania, and shortly thereafter, said counsel submitted a formal appearance which was filed with the Probate Court on February 5, 1965. Immediately after the appearance of counsel of record for petitioners, the respondent, on February 7, 1965, prepared his final and distributive account which he filed with the Probate Court on March 4, 1965. In this final account, the executor charged all the debts, expenses and costs of administration in the total amount of $17,115.23, against the distributive shares of the respondents. The residuary estate was ordered distributed in kind, upon the misrepresentation of the respondent that all parties in interest have consented, although these petitioners had no knowledge whatsoever of that proceeding. Simultaneous therewith, the respondent applied to the probate court to be appointed trustee of the distributive shares of the specific legatees, in Romania, upon the sole ground and representation *"that the legatees and distributees of decedent's estate are all residents of Romania and time will be required to determine their exact residence."* In this connection, it is highly significant that the estate was closed in less than nine months, and

that such haste is extremely unusual and impractical in probate administration.

The attorney of record for the legatees, petitioners herein, was not informed or notified about the filing of the final and distributive account, nor did he receive a copy thereof, nor was he informed about the application to appoint a trustee for the distributive shares of the legatees in Romania. He also was not informed about the date of the hearing of the final account and of the application to appoint trustee, and neither he nor his clients, the specific legatees, had any knowledge, whatsoever, of the proceedings with regard to the final account and of the proceeding to appoint trustee in time to appear at the hearing thereof.

Upon learning of the actions of the respondent in closing the estate and in withholding payment of their distributive shares in full, the petitioners, through their local counsel, filed motions to vacate the order settling the final account, for leave to file exceptions thereto, and to remove the trustee. These motions came on for hearing on February 1, 1966, before the Probate Judge of Lorain County, Ohio. Thereafter, briefs were filed by counsel for the respective parties within the time limits agreed upon in open court. The judge failed to decide the motions after the lapse of more than eight months without any apparent reason, although repeatedly requested to do so. Upon the filing of an affidavit of prejudice, the judge voluntarily withdrew from the case. Thereupon, another hearing was had before a visiting judge assigned to the case, and, shortly thereafter, a decision was rendered overruling the motions of the petitioners.

Upon appeal to the Court of Appeals, the judgment below was affirmed (Appendix B).

The constitutional arguments herein were presented and urged vigorously from the inception in all proceedings before the state courts.

REASONS FOR GRANTING THE WRIT.

1. The fundamental right to the aid of legal counsel is an integral part of the constitutional safeguards accorded these petitioners by the Fourteenth Amendment to the Constitution of the United States.

The force and validity of the petitioners' contention that the decisions below were rendered in disregard of their constitutionally protected rights of due process and equal protection of the laws can best be evaluated in the context of various declarations of this Court in matters involving an attorney at law. In his concurring opinion in *Schware v. Board of Examiners*, 353 U. S. 232, 247, Mr. Justice Frankfurter stated as follows:

> "One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., 'in the defense of right and to ward off wrong.' "

Mr. Justice Black declared in *Brotherhood of R. R. Trainmen v. Virginia*, 377 U. S. 1:

> "* * * laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, * * *."

And in *Gideon v. Wainwright*, 372 U. S., 335, Mr. Justice Black, in the delivery of the court's opinion, stated:

> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designated to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

To borrow from the words of Mr. Justice Black, "this noble idea cannot be realized" if the interests of a non-resident heir are dealt with in disregard of legal counsel retained by him to protect and preserve his rights. The rights accorded to foreign heirs by the probate laws of a state are of little avail if they do not comprehend the right to be represented by legal counsel.

In our case, the petitioners were not denied the right to legal counsel, outright, but, the effect was identical in view of the arbitrary refusal on the part of the fiduciary and the court to notify counsel of the various proceedings dealing with and affecting the rights of the petitioners.

The failure and/or refusal of the Ohio courts to recognize and respect the role of counsel for real parties in interest in the process of the administration of a decedent's estate is so offensive to the common and fundamental ideas of fairness, as to amount to a denial of due process of law. The attitude of the State courts of Ohio, regarding the function and role of a lawyer, as counsel of record for legatees, constitutes a denial of fundamental fairness, shocking to the universal sense of justice. "Like the court itself, an attorney is an instrument or agency to advance the ends of justice," 7 *Am. Jur.* 2d, Section 3, Attorneys at Law. Certainly, a judicial tribunal, such as the probate court below, which deliberately ignores the official appearance of an attorney for specific legatees, and especially non-resident parties, is guilty of violating fundamental rights.

2. The deliberate refusal of the respondent to notify counsel of record for the specific legatees of the filing of his final account, of his application for appointment as trustee of the distributive shares of the said legatees, or to notify the specific legatees or their counsel of his actions affecting

their rights, renders all orders of the court affecting the rights of the petitioners constitutionally invalid.

The probate court is charged by law with the duty of preserving and protecting the rights of all heirs, devisees and beneficiaries of decedents' estates. Basic thereto, is the correlative duty to notify all parties in interest of each and every proceeding which may affect their rights, and to afford them an opportunity to appear to protect their rights.

The Ohio Supreme Court has held that an executor or administrator acts for the Probate Court in the performance of its administrative duties, *In Re Estate of LaPenta*, 165 Ohio St., 538. The Ohio court went on to state, relevant hereto: "The court had a duty to have and thus an interest in having the estate distributed to the rightful heirs * * * and also a duty to have and an interest in having no partiality toward any one who claimed to be such."

What are the minimal requirements of due process with regard to notice and opportunity to appear?

Murphy v. Helena Rubenstein Co., 234 F. Supp. 893, page 596:

> "The demands of due process required by the Fourteenth Amendment are such as accord with the traditional concept of fair play, substantial justice, and a resolution of controversy upon the merits. These are the very pillars of Anglo-Saxon law. It is to this end that minimal procedural due process requirements must be met, not only in subjecting a party to a suit, but as well and with like equality of treatment before the law, affording such party an opportunity to defend. *But defense of such an action by its very terms implies adequate notice. Consequently, procedural due process requires adequate notice.*" (Italics ours.)

This Court had occasion to enunciate the applicable rules of due process concerning notice. In *Mullane v. Central Hanover Bank*, 339 U. S., 306, the court ruled that even notice by publication as authorized by state statute may be insufficient to satisfy due process. Pertinent hereto, the court (pp. 314, 315) stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U. S. 457; Grannis v. Ordean, 234 U. S. 385; Priest v. Las Vegas, 232 U. S. 604; Roller v. Holly, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly supra, and cf. Goodrich v. Ferris, 214 U. S. 71."

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

Subsequent thereto, the Court followed the Mullane decision in a similar problem involving notice, and declared in *Schroeder v. City of New York*, 371 U. S. 208, 212:

> "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings."

It is established, therefore, that in order to satisfy the constitutional requirements of due process in any proceeding, such notice must be given as is "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Moreover, "this right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank.*

The record in the instant matter clearly reveals that the due process requirements regarding notice and hearing were ignored deliberately. The rule enunciated in *Mullane* and followed in *Schroeder* states that only personal notice will satisfy due process "with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings." In our case, the names and addresses of the complaining legatees were known to or very easily ascertainable by the respondent. His failure and/or neglect to notify the specific legatees or their counsel of the various proceedings undertaken by him vitiates all the orders and decrees of this Court affecting their rights.

It must be emphasized that the respondent had the duty to notify the complaining petitioners of all proceedings undertaken by him wherein their interests may be affected. The appearance by an attorney benefits the court and its fiduciary in that it enables them to fulfill the due process requirement of notice. To ignore the appearance of an attorney representing interested parties, as was done in the instant case, is to disregard the constitutional obligation of due process of law.

CONCLUSION.

The decisions below are inconsistent with and in disregard of the constitutionally protected rights of these petitioners. The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. VINTILLA,

Counsel for Petitioners.

APPENDIX "A."

OPINION OF PROBATE JUDGE.

The will of John Danila, a native of Romania, but then living in Lorain County, Ohio, was drafted and signed on June 16, 1964. By his will, he:

1. directs the payment of his debts,

2. gives certain direction as to his burial,

3. directs the equal distribution among seven relatives, all residents of Romania, of the "moneys *remaining* under my name on deposit" in three financial institutions and with reference to that bequest the will says:

> "In the event that my said executor, at his own discretion is convinced that the distribution made to the aforementioned relatives should be made beyond the closing date of my estate, it is my wish that he requests of the Probate Court of Lorain County to appoint a Trustee for the purpose of sending the share of my above-mentioned relatives in the amounts of not more than $100 (One Hundred Dollars) per month until the trust estate will be completely exhausted."

4. divide the "rest and residue" of his property one-third to an individual and one-third each to two religious organizations.

The last item of the will then reads as follows:

> "*Item V.* I make, nominate and appoint George Dobrea to be the executor of this, my last will and testament hereby authorizing and empowering my said executor to *compound, compromise, settle and adjust all claims and demands in favor of or against my estate, including inheritances taxes, succession taxes and court costs from the money deposited in banks.*" (Italics added.)

He died a resident of Lorain County on June 27, 1964, and on June 20, (*sic*) 1964, an application to probate the

will was filed in the Probate Court of that county, an order was entered admitting the will to probate and George Dobrea was appointed executor.

The will was prepared by attorney John J. Sibisan of Cleveland and the executor at all times has been, and still is, represented by him.

The inventory discloses that the only accounts in financial institutions belonging to this decedent at the time of his death were the three accounts referred to in the third item in the will. These three accounts totaled $40,-544.33.

The executor paid the debts and costs of administration, the inheritance tax (at least in part) and the estate taxes from these three accounts. The other assets of the estate, consisting of securities, were all distributed in kind to the residuary legatees.

On January 13, 1965, an application was filed to determine the Ohio inheritance taxes which reflected this allocation of assets and the inheritance taxes were computed by the court on that basis. The consent and waiver of the Tax Commission was received on February 3, 1965, and the certified copy of the journal entry determining those taxes was sent to the auditor on February 5, 1965.

On February 5, 1965, the appearance of John R. Vintilla as attorney for the seven legatees referred to in the third item of the will was noted of record.

Receipts showing the payment of the inheritance tax was filed February 20, 1965, and the executor's final account was filed March 4, 1965. By court order the account was set for hearing on April 10, 1965, and the publication of the notice required by Section 2109.32, followed. No exceptions to the account were filed but on April 10, it was continued without day. The reason for that continuance is not established but it was heard and approved on April 27, 1965.

Prior to the filing of the final account (on February 6, 1965) George Dobrea had filed, as Case No. 44406, an application to be appointed as testamentary trustee of the amounts to be payable to the Romanian legatees under the third item of the will. That appointment was made and it appears to be conceded that payments of $100.00 a month to each of the seven beneficiaries of this trust have been, and are now being made.

On January 14, 1966, a motion was filed on behalf of the seven legatees mentioned, seeking (a) an order vacating the April 27, 1965, approval of the final account with leave to file exceptions to that account and (b) an order terminating the trust.

Those motions were heard and submitted on December 7, 1965, and after consideration thereof the court concludes:

> (a) that these seven legatees were not "parties to the proceedings" relating to the final account within the meaning of Section 2109.35(B),
>
> (b) their motion having been filed well within time, they are entitled under Section 2109.35(B) upon, but only upon, a showing of "good cause" to a vacation of the April 27, 1965 order.

The principal point asserted on behalf of the legatees is that the debts of the estate, the costs of administration and the federal estate taxes, should have been paid out of the residuary estate. It is assumed here that if the validity of that proposition can be said to be even reasonably debatable, then the motion to vacate of the April 27, 1965, order should be granted to the end that that issue may be considered fully upon its merits.

And it probably must be conceded that the debts and costs of administration, including federal estate taxes, are to be paid out of the residuary estate unless the will, rea-

sonably construed, makes other provision for their payment. Here:

(a) this will first directs the payment of the testator's debts and makes provision as to his burial and it then directs the equal distribution among seven individuals of that, but only of that, which "remains" in three specific accounts of the testator.

(b) the last item of the will then authorizes the executor to "settle * * * all claims and demands * * * against my estate, including inheritance taxes, succession taxes and court costs *from money deposited in banks.*"

(c) the three accounts referred to in subparagraph (a) above are the only assets of the decedent which could possibly be considered as "money deposited in banks."

The court therefore concludes that, by the only permissible construction, this testator's will did require that the debts, costs of administration, and taxes be paid from the three accounts in question.

It has been asserted also, that there was some irregularity in the proceedings relating to the distribution in kind of the securities to the residuary legatees. Were that true, which seems doubtful, it would not, in the court's opinion, be of any consequence to the other legatees.

The court finds no substance to the asserted claims of fraud and unfair dealings by the executor and his counsel or in the charge of irregularity in the appointment of the testamentary trustee.

Also, the court suggests, but does not decide, that the order appointing the testamentary trustee, having been made in a separate proceedings under a separate number, might more properly have been attacked by a motion in that proceedings instead of in Case No. 43653. It is as-

sumed here that this possible procedural defect may be waived as immaterial.

An order therefore may be entered denying the motion of January 14, 1966, in its entirety.

APPENDIX "B."

OPINION OF COURT OF APPEALS.

PER CURIAM:

On June 30, 1964, an application for probate of the will of one John Danila, who died June 27, 1964, was filed in the Probate Court of Lorain County, Ohio. In due course, the final account of the executor named in the will was filed with that court. Thereafter, notice by publication was duly made of a hearing for approval of such account. The resident legatees waived notice and consented to the approval of the account. Notice to the specific legatees, residents in and citizens of Romania, was given by publication only. No notice was given to their counsel, other than by such publication. The final account was approved April 27, 1965.

On January 14, 1966, counsel for the specific legatees filed a motion designated "Motion to vacate order settling final account, to remove trustee, and for leave to file exceptions to final account, with brief and affidavit annexed."

A hearing on that motion was begun before the Probate Judge of Lorain County, and concluded by a Probate Judge of another county, when objection was made to the local county judge by counsel for the movants.

It is apparent that if a motion to vacate, as is filed herein, is to be upheld, it must be in accord with Section 2109.35, Revised Code. In the instant case, to vacate the

order of settlement, there must either be fraud established, or good cause shown as to why the order of approval should be set aside.

This court has read the bill of exceptions, and has examined all of the files, in the light of the charges made by the movants. We, also, have examined the memorandum opinion of Judge John W. Winn. Our examination of the matters raised in this case, compels us to agree with the reasoning, and conclusion, set out by Judge Winn in his memorandum. There appears no good or compelling reason why anything further needs to be said by this court. We must concur in the judgment rendered by him, as we find no error prejudicial to the substantial rights of the appellants.

Judgment affirmed.

APPENDIX "C."

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR LORAIN COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT, FROM THE COURT OF APPEALS FOR LORAIN COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Lorain County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Probate Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

It is ordered by the court that rehearing in this case is denied.

APPENDIX "D."

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

* * * * *

RULE I.

NOTICE OF APPEAL.

Section 1. From Court of Appeals.

(A) The notice of appeal from a Court of Appeals must be filed in the court from which the case is appealed within twenty days in a civil case (Section 2505.07, Revised Code) and within thirty days in a criminal case (Section 2953.05, Revised Code) from the entry of the judgment or final order appealed from and shall set forth:

(a) The order or judgment appealed from, and

(b) Whether the case originated in the Court of Appeals, and

(c) Whether the case involved a substantial constitutional question.

* * * * *

RULE II.

DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEAL.

* * * * *

Section 3. Consideration as to Existence of Constitutional Question.

If an appellant claims a constitutional question and also proposes to prosecute an appeal on issues of law of public or great general interest, he must file both at the same time.

Where appellant claims that he has an appeal as of right (*i.e.*, that the case involves a constitutional question), the Supreme Court will *sua sponte* consider the case as on a motion to dismiss said appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

* * * * *

APPENDIX "E."

SECTION 2109.35, REVISED CODE OF OHIO.

Section 2109.35. Effect of order settling account.

The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) Such order may be vacated for fraud upon motion of any person affected thereby or upon the court's own order, if such motion is filed or order is made within one year after discovery of the existence of the fraud.

(C) Such order may be vacated for good cause shown, other than fraud upon motion of any person affected thereby who was a party to the proceeding wherein such order was made solely by reason of his having been served by publication in a newspaper in accordance with section 2109.33 of the Revised Code, if such motion is filed within one year after such person acquires knowledge of such proceeding and in any event within three years after such order is made. Such person must establish to the satisfaction of the court that he had no knowledge of the proceeding in time to appear therein.

A motion to vacate an order settling an account shall set forth the items of the account to which complaint is made and the reasons for complaining thereof, verified by affidavit.

LIBRARY
SUPREME COURT, U. S.

FILED
APR 25 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1276.

ELIZAVETA DANILA, NICOLAE DANILA, ELEANORA CATUT, ILENA POPESCU, GHEORGHE POPESCU, BUNEA POPESCU and IOAN POPESCU,

Petitioners,

vs.

GEORGE DOBREA,
Executor of the Estate of John Danila, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

The Respondent herein is at a loss to determine by what method of reasoning the Petitioners arrived at the two questions which he presented to this Court for consideration.

1. In submitting the case for the consideration of the Court of Appeals, Ninth Judicial District of Ohio, the Petitioners raised the issue which is now presented to this Court, by asking the Court of Appeals to reverse the decision of the Probate Court of Lorain County, State of Ohio, for the reason that: "Refusal of the executor to notify the specific legatees of the proceedings connected with the filing of the final account constituted a denial of due process of law. (Art. I, Sec. 16, Ohio Constitution) (14th Amendment of the Constitution of the United States.)"

2. Under the title, Statement of the Questions of Law Involved, as presented to the Supreme Court of Ohio, the Petitioners herein expand the questions of law involved. They presented the following three questions:

> "1. May the executor of an estate ignore and refuse to give notice to, an attorney of record for the specific legatees, regarding the filing and hearing of his final account, and other actions and proceedings affecting the rights of the specific legatees?
>
> "2. Must an executor of an estate give personal notice to specific legatees whose addresses are known to him or readily ascertainable?
>
> "3. Are the orders of the Probate Court approving the final account of an executor and appointing the executor as trustee of the distributive shares of the specific legatees, with no notice to the legatees or their counsel of record except by publication, in accordance with due process of law and binding upon said legatees?"

It is with deep regret that the Respondent must bring to the attention of the Court that the raising of the questions above were based not on the facts of the case, nor were the questions presented intended to clarify the law at any time, but most likely to confuse the issues.

3. On page 4 of the Petition for Writ of Certiorari the counsel leaves out of his quotation of Item III of the will, the part under which the decedent gives the executor discretionary power in creating a testamentary trust. The quotation of Item III of the decedent's will should be amended to include the following language:

> "In the event that my said executor, at his own discretion is convinced that the distribution made to the aforementioned relatives should be made beyond the closing date of the estate, it is my wish that he requests of the Probate Court of Lorain County to

appoint a trustee for the purpose of sending the share of my above mentioned relatives in the amounts of not more than $100. (One Hundred Dollars) per month until the Trust Estate will be completely exhausted."

The Respondent suggests that the statement of facts of this case be considered as they appear in the Memorandum of Opinion of Judge John W. Winn. (Petitioners' brief, Appendix "A," page 14.)

REASONS FOR DENYING THE WRIT.

1. The questions raised by the Petitioners in the Probate Court of Lorain County were properly answered at various stages of the proceedings, including the Petitioners' claim in the Court of Appeals that service by publication is a denial of due process.

2. If there is any question to be presented to this Court it will be the one concerning the unconstitutionality of Section 2109.35, Effect of Order Settling Account, Revised Code of Ohio. (Respondent's Appendix "C.")

3. In Ohio, as in many other jurisdictions, ex parte proceedings in the Probate Court are by nature of an action in rem. *Estate of Stafford,* 146 Ohio St., 253, Syl. 3:

> "There is the established law in Ohio, and in practically every jurisdiction in the United States that in an action in rem service by publication satisfies procedural due process as required in the Constitution of the United States."

The Handbook of American Constitutional Law, Page 143. Henry Rottschaefer:

> "Due process requires that those whose interest in the res will be affected by the judgment in an action in rem be given notice of, and an opportunity to be heard in the proceedings. Notice by publication is all

that is required in such action if the court has jurisdiction of the res."

42 *Yale Law Journal* 333, Walter Wheeler Cook:

> "Except in cases affecting the personal status of the plaintiff, an action in which that mode of service may be considered to have been assented to in advance as hereinafter mentioned, the substitute service of process by publication, allowed by the State of Oregon and by similar laws in other states where actions are brought against nonresidents, is effectual only where, in connection with the process against the person having commenced the action, property in the state is brought under the control of the court, subjected to its disposition by the process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem."

It is axiomatic that one may not take advantage of the rights afforded by a statute and then attack its constitutionality. This is the situation in this case where the Petitioners using the provisions of Section R. C. 2109.35 of the Ohio Code, filed a motion to set aside the final account. But, being dissatisfied with the decisions reached by the courts in hearing their motion, now claim that the said section is unconstitutional.

4. There is no magic formula in raising a constitutional question, but the courts demand that the claim of invalidity and the grounds therefor, be brought to the attention of the court with fair precision and due time. *Bryant vs. Zimmerman,* 278 U. S. 63.

5. At page 13 of the Petitioners' brief, a quotation is taken from *Mullane vs. Central Hanover Bank,* 339 U. S. 306 (pp. 314, 315). The Petitioners failed to notice the second paragraph at page 314 of the *Mullane* case which reads:

"* * * we disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books."

6. At page 313 of the *Mullane* case, the court uses the following language:

"In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the Trustee answer for negligent or illegal impairment of their interests. * * *"

Part of the Ohio Revised Statute 2109.35, as shown in the Petitioners' brief, Appendix "E," grants to a beneficiary entitled to notice by publication the very right which was denied to the beneficiaries of the trust in the *Mullane* case.

7. This Respondent takes no exception to the cases cited by the Petitioners, but strenuously objects to their interpretation of the Ohio Revised Code, Sec. 2109.35 (Respondent's Appendix "C"), which must be read and interpreted together with Sec. R. C. 2109.32 (Respondent's Appendix "A") and R. C. 2109.33 (Respondent's Appendix "B").

8. Let us examine the statutes mentioned above: Under Section 2109.32, Revised Code, every fiduciary account shall be set for hearing before the Probate Court:

(a) Within one month the court shall cause the publication of the notice of the filing of an account; and

(b) Set for a hearing on the account within thirty days; and

(c) At the hearing the court shall inquire into, consider and determine all matters pertaining to the

account as well as order the account approved and settle and discharge the fiduciary.

Section 2109.33 R. C. provides that, in addition to the notice required under Section 2109.32 R. C., a fiduciary *may serve notice* of the hearing upon the account, or *he may cause such notice to be served,* upon any person who has an interest in the estate or trust. The Probate Court after notice to the fiduciary, either upon the request of an interested party, or on its own motion, *may order that such notice be given.*

It is interesting to note that none of the provisions of Section 2109.33, R. C. are mandatory, and this applies equally to the fiduciary as well as the Probate Court which can act on its own motion.

It is obvious that the legislature in its wisdom believed it to be necessary to enact Section 2109.35, R. C. which can be considered some sort of savings clause since the provisions of this Section are such that if a fiduciary failed to give personal notice as suggested by Section 2109.33, Revised Code, an order in the settlement of a fiduciary account may be vacated by a motion filed, (a) within a year after discovery of fraud, or (b) by the showing of good cause by a person who was a party to the proceedings wherein such order was made solely by reason of his being served by publication in accordance with Section 2109.33, Revised Code and the person filing such motion must establish to the satisfaction of the court that he had no knowledge of the proceedings in time to appear.

It is a further requirement of this Section that the motion based on good cause shall also set forth the items in the account excepted to and the reasons therefor, verified by affidavit.

Part of Section 2109.35, Revised Code, under paragraph (D) states further that:

"* * * an order settling an account shall not be vacated unless the court determines that there is good cause for doing so and the burden of proof of good cause shall be upon the complaining party."

CONCLUSION.

It will be apparent from the records of this case that the Petitioners being dissatisfied with the decisions of the courts of the State of Ohio, attempt to have this Court receive the case at bar under the color of a constitutional question. May we draw the attention of this Court to the last two paragraphs of the per curiam opinion of the Court of Appeals of the Ninth Judicial District of Ohio. (Petitioners' Appendix "B.")

> "It is apparent that if a motion to vacate as is filed herein, is to be upheld, it must be in accord with Section 2109.35, Revised Code. In the instant case, to vacate the order of settlement, there must either be fraud established, or good cause shown as to why the order of approval should be set aside.
>
> This court has read the bill of exceptions, and has examined all of the files, in the light of the charges made by the movants. We, also, have examined the memorandum opinion of Judge John W. Winn. Our examination of the matters raised in this case, compels us to agree with the reasoning, and conclusion, set out by Judge Winn in his memorandum. There appears no good or compelling reason why anything further needs be said by this court. We must concur in the judgment rendered by him, as we find no error prejudicial to the substantial rights of the appellants."

It is apparent that the Supreme Court of Ohio could not find sufficient reason to overrule the lower courts and elected to dismiss the Petitioners' appeal for the reason that no substantial constitutional question existed. Re-

spondent maintains that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN J. SIBISAN,
Counsel for Respondent.

APPENDIX "A."

Section 2109.32, Revised Code of Ohio. Hearing on account; notice.

Every fiduciary's account required by section 2109.30 of the Revised Code shall be set for hearing before the probate court. Within one month after an account is filed, the court shall cause notice of the filing of such account and the time and place of the hearing thereon to be published once in some newspaper of general circulation in the county. The hearing on the account shall be set not earlier than thirty days after the publication of such notice. The costs of such notice, if more than one account is specified in the same notice, shall be paid in equal proportions by the fiduciaries.

At the hearing upon an account, the court shall inquire into, consider, and determine all matters relative to such account and the manner in which the fiduciary has executed his trust, including the investment of trust funds, and may order the account approved and settled or make such other order as the court deems proper. If, at the hearing upon an account, the court finds that the fiduciary has fully and lawfully administered the estate or trust and has distributed the assets thereof in accordance with the law or the instrument governing distribution, as shown in such account, the court shall order the account approved and settled and may order the fiduciary discharged.

APPENDIX "B."

Section 2109.33, Revised Code of Ohio. Service of additional notice; exceptions to account.

In addition to the notice required by section 2109.32 of the Revised Code, a fiduciary may serve notice of the hearing upon his account, or may cause such notice to be served, upon any person who is interested in the estate or trust. The probate court, after notice to the fiduciary, either upon the motion of any interested person for good cause shown or at its own instance, may order that such additional notice be served upon such persons as the court designates.

Such notice shall set forth the time and place of the hearing and shall specify the account to be considered and acted upon by the court at the hearing and the period of time covered by such account. It shall contain a statement to the effect that the person notified is required to examine such account, to inquire into the contents thereof and into all matters that may come before the court at the hearing thereon, and to file any exceptions which such person may have to such account at least five days prior to the hearing on the account, and that upon his failure to file exceptions thereto, the account may be approved without further notice. If the person to be notified was not a party to the proceeding wherein any prior account was settled, such notice, for the purpose of barring any rights possessed by such person, may include and specify such prior accounts and the periods of time covered thereby. In such event, the notice shall inform the person notified that the approval of the account filed most recently will terminate any rights possessed by him to vacate the order settling each prior account so specified, except as provided in section 2109.35 of the Revised Code, and shall further inform such person that, under penalty of losing such

rights, he forthwith shall examine each prior account so specified, shall inquire into the contents thereof, and, if he deems it necessary to protect his rights, shall take such action with respect thereto as is permitted by law.

* * * * *

APPENDIX "C."

Section 2109.35, Revised Code of Ohio. Effect of order settling account.

The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) Such order may be vacated for fraud, upon motion of any person affected thereby or upon the court's own order, if such motion is filed or order is made within one year after discovery of the existence of the fraud. Any person who is subject to any legal disability may file such motion at any time within one year after the removal of such disability or within one year after he discovers the existence of the fraud, whichever is later, or his guardian or a successor guardian may do so during the period of such disability. If the death of any person occurs during the period within which he could have filed such motion, his administrator or executor may file such motion within one year after death.

(B) Such order may be vacated for good cause shown, other than fraud, upon motion of any person affected thereby who was not a party to the proceeding wherein such order was made and who had no knowledge

of such proceeding in time to appear therein; provided that if the account settled by such order is included and specified in the notice to such person of the proceeding wherein a subsequent account is settled, the right of such person to vacate such order shall terminate upon the settlement of the subsequent account. A person affected by an order settling an account shall be deemed to have been a party to the proceeding wherein such order was made if such person was served with notice of the hearing thereon in accordance with section 2109.33 of the Revised Code, waived such notice, consented to the approval of the account, filed exceptions thereto, or is bound by section 2109.34 of the Revised Code; but no person in being who is under legal disability at the time of such proceeding shall be deemed to have been a party thereto unless he was represented therein as provided in section 2111.23 of the Revised Code. Neither the fiduciary nor his surety shall incur any liability as a result of the vacation of an order settling an account in accordance with division (B) of this section, if the motion to vacate such order is filed more than three years following the settlement of the fiduciary's account showing complete distribution of assets; but the limitation prescribed shall not affect the liability of any heir, devisee, or distributee either before or after the expiration of such period.

(C) Such order may be vacated for good cause shown, other than fraud, upon motion of any person affected thereby who was a party to the proceeding wherein such order was made solely by reason of his having been served by publication in a newspaper in accordance with section 2109.33 of the Revised Code, if such motion is filed within one year after such person acquires knowledge of such proceeding and in any event within three years after such order is made. Such person must estab-

lish to the satisfaction of the court that he had no knowledge of the proceeding in time to appear therein.

(D) Such order may be vacated for good cause shown upon motion of the fiduciary; if such motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust.

A motion to vacate an order settling an account shall set forth the items of the account with respect to which complaint is made and the reasons for complaining thereof, verified by affidavit.

The person filing a motion to vacate an order settling an account, or such other person as the court may designate, shall cause notice of the hearing thereon to be served upon all interested parties who may be adversely affected by the order of the court granting such motion.

An order settling an account shall not be vacated unless the court determines that there is good cause for doing so and the burden of proving good cause shall be upon the complaining party.

* * * * *

SUPREME COURT, U. S.

FILED

JUN 6 1968

JOHN F. DAVIS, CLERK

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that this Court grant rehearing of its order of May 27, 1968, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Ohio Supreme Court in the above entitled case as prayed for in the petition filed March 29, 1968, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. The Ohio courts, including the Supreme Court of Ohio, have consistently discriminated against these petitioners and all litigants who happen to be of Romanian citizenship. They have condoned flagrant violations of the rights granted to Romanian heirs by the laws of Ohio in a "persistent and subtle" way, which would not have been

tolerated had the parties resided in the United States. Mr. Justice Douglas in his dissenting opinion in this case very correctly ascertained that "there seems to be *some* basis for believing that the case is a relic of the Cold War and that petitioners were discriminated against * * * because of their Romanian citizenship * * *." We represent, sincerely, that a scrutiny of the entire record of this cause, on the merits, along with other similar cases in Ohio, will readily disclose to any impartial observer that there is very *definite and abundant* basis for concluding "that the case is a relic of the Cold War and that petitioners (and others similarly situated) were discriminated against because of their Romanian citizenship * * *."

We invite the attention of this Court to two other cases, similar in nature and brought before this Court, wherein gross and flagrant violations were perpetrated against the rights of Romanian heirs, which violations were subtly condoned by the Ohio courts, and which cases were denied review by this Court. We have reference to the cases of *Etel Ober, et al. v. James C. Nagy, et al.*, October Term, 1967, No. 106, cert. denied October 16, 1967, and *Ernest Fogarascher, et al., v. Fricke*, October Term, 1966, No. 221, cert. denied October 10, 1966. In the *Nagy* case, the rights of Romanian citizens as heirs to a decedent's estate were denied arbitrarily by the Ohio courts in the face of abundant documentary evidence and uncontroverted testimony establishing heirship, and despite the favorable ruling of a Referee designated by the Probate Court to hear the petition to determine heirs. In addition, counsel of record informed all the courts, which concluded that there are no heirs in Romania, that he had met with the heirs in Romania, had examined their official identity cards, and had them photographed for the record of the case. This, plus a last desperate appeal to the judges

who perpetrated this travesty of justice, fell upon deaf ears (see Appendix I attached hereto).

The decision of the Ohio courts in the *Fricke* case is totally without legal justification, and the only reasonable explanation of the result is that the courts deliberately refused to protect and preserve the rights of "parties residing behind the Iron-Curtain." Reasonable minds can reach no other conclusion.

The *Fricke* case involved a conflict between heirs of the decedent who live in Romania and a party, who claimed to be the common law wife of the decedent, and who resides in West Germany. This party, through a Cleveland lawyer, belatedly made a claim to the estate as an alleged common law wife. The contention of being a common law wife was asserted despite the fact that all the close friends and acquaintances of the decedent, with whom he lived in Cleveland, stated that the decedent left no surviving spouse, see Statement of Facts, page 3, and Appendix E, Petition for Writ of Certiorari, *Fogarascher et al. v. Fricke,* October Term, 1965, No. 221. The proceeding in the Probate Court, by which the alleged surviving spouse sought to participate in this estate, was not brought to the attention of the heirs in Romania, either by actual notice or by publication. There was no effort made, whatsoever, to apprise the heirs in Romania of the pendency of the action and to afford them an opportunity to present their objections. And all of this was condoned by the courts in disregard of the fact that the record of the Probate Court revealed that the decedent left heirs in Romania, and despite the knowledge on the part of counsel of record for the alleged spouse that undersigned counsel had represented and continues to represent the rights and interests of Romanian citizens to a decedent's estate in Ohio and elsewhere.

The injustice of the *Fricke* decision was further compounded by another instance of a gross violation of the rights of the Romanian heirs. The only evidence which was submitted to establish that the party was the common law wife upon which the Probate Court decided that issue was the testimony given by way of deposition in Germany by the alleged common law wife, who is not permitted to testify in such a case under Ohio law, and her family and friends in Germany. Once again, the deposition was taken without any notice, either actual or by publication, and without an opportunity, to the heirs in Romania, to present their defense or objections to the claim of the alleged surviving spouse. Although these serious legal defects were specifically and repeatedly brought to the attention of all the Ohio trial and appellate courts, the constitutional safeguards accorded to non-resident heirs by the Ohio and Federal Constitutions were of no avail to the complaining parties simply because of their place of residence and the nature of their citizenship. On the basis of the record in the case, there can be no other logical and reasonable explanation of the conclusion reached by all the courts through which the matter passed.

2. The issue of the constitutional right of equal protection of the laws and due process accorded to non-resident heirs who happen to be of Romanian nationality has been and continues to be one of large practical importance in the administration of decedents' estates in Ohio and other parts of our country. At the moment, it is clearly established and, therefore, indisputable, that the courts of Ohio do not protect or preserve the rights of Romanian citizens with that degree of impartiality and duty obligation required by the oath and nature of the judicial office. This practice has not abated and will continue despite the ruling in *Zschernig* and *Goldstein v. Cox*, 389

U. S. ____. The courts persist in the notorious practice of withholding distribution to those behind the "Iron Curtain" by engaging in subtle ways of abrogating their rights, as evidenced in the *Nagy* and *Fricke* cases. Other recent examples of this practice may be found in the case of *Michal Mora, et al. v. Reed S. Battin, Judge of the Probate Court of Trumbull County, Ohio,* now pending before a three judge court in the United States District Court for the Northern District of Ohio, Eastern Division, No. C 68-227, and the case of *Gorun, et al., v. Fall, et al.,* Civil No. 1623, which is to be heard by a three judge court in the United States District Court of Montana on June 27, 1968.

Of extreme relevance hereto is also the case of *Goldstein v. Cox,* 389 U. S. ____, 36 L. W. 4120. On January 15, 1968, this Court entered its Per Curiam order granting certiorari, vacating the judgment of the United States Court of Appeals, and remanding the case to that court "for further consideration in the light of Zschernig v. Miller, * * *." On March 8, 1968, said Court of Appeals entered its order remanding the *Goldstein* case back to the District Court "for consideration of the constitutional issues by a three-judge court pursuant to 28 U. S. C. Section 2281." Although, we believe that the Court of Appeals in *Goldstein* did not comply with this Court's mandate of January 15, 1968, nevertheless, in order to avoid further delay of a decision and final judgment in this matter, a Motion for Summary Judgment was filed in the District Court on the basis of the decision in *Zschernig.* Inexplicably, the Motion for Summary Judgment came on for hearing on April 23, 1968, before one District Judge, who did nothing at the time except indicate that he would take the matter under advisement. In view of the current activity of the New York Attorney General, it would appear that the disposition of the *Goldstein* case is in a state

of confusion, with no one in authority prepared to determine the precise status of the said cause, see Appendix II, III, IV, V, VI, annexed hereto.

To deny a full scale review of the instant cause is to permit the state courts to continue in their abusive and improper practices toward the rights of non-resident heirs residing in countries whose policies they disapprove, and to encourage trespassing by the states in "an area where the Constitution contemplates that only the National Government shall operate."

The decision in this and the other cases referred to herein, "indeed, illustrate the dangers which are involved if each state, speaking through its probate courts is permitted to establish its own foreign policy."

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Ohio.

Respectfully submitted,

JOHN R. VINTILLA,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

John R. Vintilla, of counsel for the Petitioners herein, hereby certifies that the foregoing Petition for Rehearing is presented in good faith, and is not for purposes of delay.

JOHN R. VINTILLA.

APPENDIX I:

6 December 1967

Honorable Frank J. Merrick,
Judge, Probate Court
of Cuyahoga County
Court House
Cleveland, Ohio 44113

Re: Estate of Theresa Kovacs
Petition to Determine Heirship
Case No. 640974

My dear Judge Merrick:

I am writing you in accordance with the accepted and established legal principle that "it is never too late to undo an injustice."

Believing firmly, as I do, that the sole objective of our judicial tribunals is to assure, within human possibility, that substantial justice shall be secured to all who may come before the court, I am taking the liberty of appealing to your sense of fair play in the resolution of the instant matter.

In view of my steadfast and unshaken belief that a serious injustice has been done to my clients in this matter, I have taken the case through the state courts, and then to the Supreme Court of the United States. Upon a denial of certiorari by the latter tribunal, I filed a petition for rehearing which also was denied.

As a result of the unique and unusual circumstances of this case, I am unable to believe that the mere exhaustion of judicial remedies can satisfy the ends of justice in this instance. I have in mind that the two heirs whom I represent are alive, that I have met and spoken with them, and that there is abundant probative evidence to that effect

with no rebuttal or contravention in the record of this fact. More important, however, I refer to my testimony and professional statement in the record, as an active member of the bar, that I have met with the heirs in Romania and obtained reliable and proper documentation of the fact that the heirs who I represent are alive. In the light of this unchallenged professional representation, I am unable to comprehend how the legal conclusion reached in this case may be considered valid and just.

The only conclusion which I can draw, therefrom, and, I believe, which any reasonable mind can conclude therefrom, is that the court through which this matter passed gave no credence, whatsoever, to my testimony and professional statement that the heirs in Romania are alive. Assuming that such was the case, it would appear to me that, at least, a serious probability was injected concerning the survival of the heirs in question, and, that, consequently, a court would want to pursue the reality of the issue further. The failure of any of the courts to explore this aspect further is the disturbing element of this case.

You should know that at the hearing before the Referee, it was suggested that the heirs here (two brothers who reside in Cleveland and principal parties to the action) would be willing to pay all expenses if their sister, Etel Ober, would come to the United States. Although, I felt that such an offer was insincere and made in the belief that the sister could not come from behind the so-called "Iron Curtain," it was not taken seriously by the undersigned for two independent reasons. First, it was believed to be irrelevant, and, certainly, there could be no valid basis for such a request. Secondly, and more important (the undersigned has had clients come here from Romania for court appearances in essential and proper situations),

the sister in Romania, Etel Ober, was not well and suffers from a heart condition (she is an elderly and heavyset woman). To compel her to come to the United States, without any justifiable and valid reason therefor, would require the undertaking of a serious responsibility by the undersigned. Nevertheless, this proposition was made known to Etel Ober by the undersigned, and she rejected it.

Inasmuch as the heirs in Romania did survive our decedent, and are alive at the date hereof (see letter of Etel Ober, attached), it would be a travesty of justice to allow the present order to stand. I, therefore, would suggest and sincerely request that you appoint a special commissioner to go to Romania to resolve the issue whether Etel Ober and Ioan Nagyivan, niece and brother of Theresa Kovacs, deceased, have survived our decedent. In connection with the travel of the commissioner to and in Romania, the undersigned hereby makes the following offer:

1. He will advance and pay for all essential expenses of travel, hotel and meals of the commissioner to fulfill the mission and duty assigned to him, as aforesaid.

2. If the special commissioner finds and concludes that my clients, Etel Ober and Ioan Nagyivan of Romania, survived our decedent, all expenses incurred by the special commissioner in his travel to and from Romania in connection herewith shall be the personal obligation and liability of James Nagy and Joseph Nagy, parties hereto, and the court shall order them to reimburse the undersigned for all sums advanced and paid by him.

3. The special commissioner appointed by the court must be approved by the undersigned.

As a suggestion, I would offer the name of Thomas Joyce, an employee and officer of your court.

Respectfully yours,

JOHN R. VINTILLA.

JRV:Dac
cc: Ellis V. Rippner, Esq.
Hon. Joseph H. Silbert
Hon. Charles W. White
Hon. J. J. P. Corrigan
Oscar A. Brown, Esq.

P.S. Mr. Vintilla is presently in Romania, and may be reached if necessary.

APPENDIX II.

16 April 1968

Office of the Clerk
United States District Court
United States Court House
New York, New York

Re: Goldstein v. Cox
Civil Action No. 66-4487

Gentlemen:

On March 8, 1968, the United States Court of Appeals, for the Second Circuit, entered its order remanding the above entitled cause to your court "for consideration of the constitutional issues by a three-judge court pursuant to 28 U. S. C. Section 2281."

As a result of the order of the Supreme Court of the United States in this case, 36 L. W. 4120 (1/15/68), whereby it remanded the case "for further consideration in the light of Zschernig v. Miller, 36 L. W. 4120 (1/15/68), a motion for summary judgment with affidavit and appendices annexed thereto were filed in this court by counsel for the plaintiffs. This motion for summary judgment was noticed for hearing in your court on the 23rd day of April, 1968 at 10:30 o'clock by local counsel of record in this matter.

As chief counsel for the plaintiffs, I have received conflicting and confusing reports regarding the hearing date and the manner of disposition of our motion for summary judgment. I, therefore, would appreciate an advice from your office concerning the hearing and disposition of our motion for summary judgment. In this connection, I wish to inform the court that the plaintiffs do not insist upon an oral hearing of the motion for summary judgment and shall so stipulate if same meets with the approval of our adversaries. If it is the practice and/or desire of the court to hear oral argument prior to its disposition of such motions, I should like to inform you that the oral argument will be made by the undersigned who will be out of the country from April 24th to May 15th.

In view thereof, I would appreciate your reply hereto on or before April 22nd if at all possible.

Respectfully yours,

JOHN R. VINTILLA.

JRV: Dac
cc: Emanuel Eschwege, Esq.
Daniel Cohen, Esq.
Assistant Attorney General

APPENDIX III.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FOLEY SQUARE, NEW YORK, N. Y. 10007

April 17, 1968

John R. Vintilla, Esq.
550 Hanna Building
Cleveland, Ohio 44115

Re: Goldstein vs. Cox, 66 Civ. 4487

Dear Sir:

We received your letter of April 16, 1968 regarding the conflicting and confusing reports of the hearing date of your motion for summary judgment in the above entitled matter.

Please be advised it is set for Tuesday, April 23, 1968 at 10:00 A.M. in Room 506.

Furthermore, all motions are orally argued in this Court.

Very truly yours,

JOHN J. OLEAR, JR., *Clerk*
by RICHARD DILBERIAN
Motion Clerk

APPENDIX IV.

STATE OF NEW YORK
DEPARTMENT OF LAW
New York 13, N. Y.
488-3446

April 26, 1968

Re: *Goldstein v. Cox, et al.*

Hon. Charles H. Tenney
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

My dear Judge Tenney:

On Tuesday, April 23, 1968, your Honor, on the call of the motion calendar, directed that the motion for Summary Judgment returnable before you on that date in the above-entitled action be marked "Submitted." The undersigned had indicated that no papers had been prepared in opposition to the motion by reason of the remand of the case by the Court of Appeals to a Three Judge Court which had not yet been designated.

There is transmitted herewith an Affidavit in Opposition to the assumption of jurisdiction over this motion and action by a single District Court Judge, together with proof of service of such affidavit upon counsel for the appellants. This is done pursuant to a phone conversation with your law clerk, Mr. Peter Herbert, with whom I had

arranged for transmission of this affidavit to you on or before Wednesday, May 1, 1968.

Respectfully yours,

LOUIS J. LEFKOWITZ
Attorney General

By DANIEL M. COHEN
Assistant Attorney General.

DMC: af
cc: John R. Vintilla, Esq.
550 Hanna Building
Cleveland, Ohio

Emanuel Eschwege, Esq.
200 West 57 Street
New York, New York

APPENDIX V.

20 May 1968

Chief Judge of the
U. S. District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Goldstein et al v. Cox et al.

Dear Sir:

I am taking the liberty of writing to you in view of the apparent confusion of the disposition of plaintiffs' motion for summary judgment in the light of the mandate of the Supreme Court of the United States in this case, and the remand order of the United States Court of Appeals for the Second Circuit to this court of March 8, 1968.

Inasmuch as we deem the mandate of the Supreme Court of the United States and the remand order of the Court of Appeals self-executing, as chief counsel for the plaintiffs in the above entitled cause, I would sincerely appreciate a communication from your court about the disposition of plaintiffs motion for summary judgment heretofore filed in your court.

Respectfully yours,

JOHN R. VINTILLA,
Chief Counsel for Plaintiffs

JRV: Dac
cc: Emanuel Eschwege, Esq.
Daniel M. Cohen, Esq.
Assistant Attorney General

APPENDIX VI.

UNITED STATES DISTRICT COURT
New York, N. Y. 10007

May 24, 1968

John R. Vintilla, Esq.
550 Hanna Building
Cleveland, Ohio 44115

Re: Goldstein, et al. v. Cox, et al.

Dear Sir:

I respond to your letter of May 20, 1968. You pose certain questions which I do not believe it to be my responsibility to answer.

If you had given me the index number of the case I might have been in a position to quickly ascertain the information which you desire and supply it, but I do not consider it my obligation to consult the indices of this court to ascertain the docket number of the case in which you are interested.

Finally, if you are appearing in this court for the purposes of this case only, I would appreciate your supplying me with the name and address of a member of the bar of this court authorized to represent you here.

Very truly yours,
SIDNEY SUGARMAN.